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No. 94-69

In The

Supreme Court of the United States

October Term, 1994

SUNKIST GROWERS, INC.

Petitioner,

vs.

DEL MONTE CORPORATION
and
NABISCO BRANDS, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

All parties to the proceeding in the court of appeals are identified in the caption. Pursuant to Supreme Court Rule 29.1, Respondent Del Monte Corporation states that its parent is Del Monte Foods Co., and its subsidiaries, other than wholly-owned subsidiaries, are the following:

Del Monte Pacific Resources Limited
Central American Resources, Inc.
Hordaland Company Limited
Del Monte Philippines Inc.
Dewey Ltd.
Pacific Brands Philippines, Inc.
Yorkshire Dried Fruit & Nuts, Inc.

Respondent Nabisco Brands, Inc., states that its parents are RJR Nabisco, Inc., and RJR Nabisco Holdings Corp., and its subsidiaries, other than wholly-owned subsidiaries, are as follows:

Gelatinas Ecuatorianas S.A.
Grupo Gamesa, S.A. de C.V.
Landers Centro Americana Fabricantes de Molinos Marca "Corona", S.A. de C.V.
Mahachai Holding Co., Ltd.
Nabisco/Cetus Food Biotechnology Research Partnership
Nabisco S.A. de D.V.
Nabisco (Thailand) Limited
Sociedade Brasileira Beneficiadora de Cha' Ltda.
West Indies Yeast Company Ltd.
Yili-Nabisco Biscuit & Food Company Limited

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Del Monte Corporation and Nabisco Brands, Inc., respectfully request that the Court deny the petition of Sunkist Growers, Inc. for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rules 15.1 and 24.2, Del Monte respectfully advises the Court of the following

misstatements and omissions in the Statement of the Case submitted by petitioner Sunkist Growers, Inc. ("Sunkist").

Factual Basis Of The Dispute

Sunkist includes in its Statement of the Case an account of the acquisition, management and ultimate divestiture of Sunkist Soft Drinks, Inc. ("SSD") by Del Monte Corporation[1] (Petition at 3-4), claiming that Del Monte reversed its management strategy after acquiring SSD, that Del Monte decided to enhance the value of other subsidiaries at the expense of SSD, and that Del Monte undertook a "milking program" and otherwise interfered with SSD's performance of the License Agreement. (*Id.*) These assertions by Sunkist are not accompanied by any record citations, because they have no support in the record. What Sunkist has offered the Court as purported fact is nothing more than a recital of the theory which Sunkist advanced, but failed to prove, in the arbitration proceeding below.

At that same proceeding, Del Monte offered substantial evidence to prove that it acquired SSD, brought in experienced soft drink industry management, and invested tens of millions of dollars in the company, all with the intention of building the business successfully

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[1] In 1986 overall operating responsibility for SSD was shifted from Del Monte Corporation to its sister company, Nabisco Brands, Inc. Any corporate distinction between Del Monte Corporation and Nabisco Brands, Inc., has never been material in this litigation. For convenience, the two are hereinafter referred to collectively as "Del Monte."

and profitably. Shortly after Del Monte's acquisition of SSD, however, the two giants of the soft drink industry, the Coca Cola Company and the Pepsi Cola Company, each decided to introduce its own brand of orange-flavored soft drink in competition with "Sunkist" orange soda. Despite SSD's and Del Monte's best efforts, including the continued investment of huge amounts of capital in the face of large operating losses, the combined marketing clout of Coke and Pepsi meant that severe market share losses for Sunkist were unavoidable.[2]

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[2] The entry of Coke and Pepsi into the orange flavor segment of the soft drink market was even more disastrous for Sunkist because of its distribution system. In the late 1970s and early 1980s, SSD achieved remarkable success because it usually was able to license the best bottler in each local market. With few exceptions, this was either a Coke or Pepsi bottler. Because neither Coke nor Pepsi had a nationally successful orange brand at that time, Sunkist was able to obtain traditional bottler agreements which required flavor exclusivity (the bottler would not market any other orange soft drink), but which were terminable by either party on 90 days notice. When Coke and Pepsi introduced their orange brands, they placed tremendous pressure on their bottlers either to switch from "Sunkist" orange, or at least to carry both "Sunkist" and the cola company's orange brand simultaneously (which could only be done with SSD's permission). To compound the problem, during this same time both Coke and Pepsi aggressively began acquiring ownership of previously independent bottlers, including many that had carried the "Sunkist" brand.

SSD and Del Monte were therefore faced with a Hobson's choice: either maintain exclusivity, which would mean that many bottlers would terminate but the remainder would be dedicated to "Sunkist" as their exclusive orange brand, or allow "coexistence", which would mean that "Sunkist" would become an afterthought to the cola companies' brands in virtually every bottler throughout the system. All the projections showed that

Faced with competition from much larger rivals, Del Monte ultimately decided to sell the business. Even after the sale decision, Del Monte continued to invest heavily in the business until an appropriate new owner could be located.

Del Monte also offered evidence at the arbitration hearing that, throughout the time Del Monte owned SSD, Sunkist continued to be paid an extremely high guaranteed royalty of $7.5 million per year, and Del Monte even prepaid the final year of the guaranteed royalty in order to accomplish the sale of the company. During the same period, Del Monte lost more than $70 million on the business, including both lost equity and operating losses. Nonetheless, Sunkist claimed in hindsight that the business reversals experienced by SSD had caused it to lose even higher royalties, and that those reversals had been caused, not by the vigorous competition from Coke and Pepsi, but rather by Del Monte's "mismanagement."

In awarding no recovery to Sunkist, the arbitration panel obviously was persuaded by Del Monte's evidence. Those are issues within the exclusive province of the panel to resolve, and Sunkist's presentation to this Court of unproven and discredited allegations as fact is improper.

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huge volume losses were inevitable in the short term under either scenario, but that the long term prospects were better if Del Monte and SSD maintained the exclusivity policy, replacing bottlers who terminated with the next best available alternative in each market. Even though this strategy required a much greater immediate investment by Del Monte and SSD, it was pursued as being in the best long-term interests of the brand.

Sunkist's Claims Against SSD And Del Monte

Sunkist has also been less than fully candid with this Court in regard to the procedural history of this case. The litigation did not begin with a suit by Sunkist against Del Monte in 1987, as Sunkist suggests. (Petition at 4) Rather, it began when Del Monte and SSD jointly commenced a declaratory judgment action against Sunkist in federal District Court in Georgia on July 18, 1986. (R1-1-1)[3] SSD and Del Monte alleged that there was an actual controversy with Sunkist, based on Sunkist's assertions that SSD and Del Monte had mismanaged the Sunkist soft drink business and had breached the License Agreement. (*Id.* at 3-4) SSD and Del Monte sought, among other relief, an order requiring Sunkist to arbitrate these claims with SSD. (*Id.* at 6)

Though Sunkist now acknowledges the presence of a broad arbitration clause in its License Agreement with SSD, and concedes that it agreed to that clause because of its belief that arbitration "would be an appropriate, non-public forum to resolve promptly the disputes that developed during th[e] relationship," (Petition at 3), it is clear in retrospect that Sunkist's litigation strategy has been to attempt to avoid its arbitration obligations by any means.

Those means first presented themselves when SSD was sold by Del Monte shortly after the commencement of the litigation. (R1-6-1, 2) Sunkist proceeded to obtain repeated extensions of time to answer in the Georgia

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[3] References are to the record in the Eleventh Circuit Court of Appeals.

action (R1-3, 7, 9, 11), ostensibly for the purpose of conducting settlement negotiations with SSD under its new ownership. (R1-3-1) Del Monte was not a party to these negotiations. (*Id.* at 2) It was upon the expiration of these extensions of time to answer the Georgia complaint, which had then been pending for over six months, that Sunkist commenced the independent action referenced in the Petition at 4, in its home state of California. Sunkist is incorrect when it implies that the California action was brought solely against Del Monte, however. (*Id.*) The suit was brought against both Del Monte *and* SSD, claiming that SSD had been operationally merged into an unincorporated division of Del Monte, and that Del Monte and SSD jointly made management decisions which breached the License Agreement and the rights of Sunkist under that agreement. (*See* R2-25-Exhibit F to Supplemental Affidavit of James N. Crittenden) (hereinafter the "California Complaint").

SSD, under the control of its new management, then voluntarily dismissed itself from the Georgia action which sought arbitration (R1-14-1), and Sunkist amended its California Complaint to voluntarily dismiss SSD, leaving Del Monte as the only defendant.[4]

Eventually, Sunkist realleged the claims from its California Complaint as counterclaims in the Georgia action. (R3-47) While there were some minor differences, the counterclaims duplicated the substance of the California Complaint, alleging that Del Monte and SSD "jointly

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[4] Sunkist's First Amended Complaint is attached as Exhibit A to its Motion for Judicial Notice filed with the Eleventh Circuit on March 26, 1992. Del Monte did not oppose the motion.

participated in" breaches of the License Agreement (*id.* at 31-33), that SSD's operations had been merged into a Del Monte division, and that Del Monte's operation and subsequent sale of the Sunkist soft drink business had been in violation of various provisions of the License Agreement, giving rise to claims by Sunkist under various legal theories. (*Id.*) It was based upon these allegations that the district court found that Sunkist was "actually suing to enforce provisions of the licensing agreement," and ordered the case to arbitration. (Petition, Appendix D at A34)

Arbitrator Conduct

Sunkist has failed to provide the Court with a full account of its challenges to Del Monte's party-appointed arbitrator, Jesse Meyers, a knowledgeable soft drink industry expert. Sunkist first requested that the American Arbitration Association ("AAA") refrain from confirming Mr. Meyers' appointment almost immediately after his selection by Del Monte was announced. (R5-68-Exhibit 1) Sunkist argued that Mr. Meyers' background in the soft drink industry and his familiarity with the issues involved in the dispute rendered him unfit to be an arbitrator (*id.*), an argument which the AAA rejected. (R5-68-Exhibit 2)

Sunkist next proposed to the neutral arbitrator selected by the parties, retired U.S. District Judge Sidney O. Smith, that the arbitration proceed before him as the sole arbitrator. (R5-68-Exhibit 4 at 1) Del Monte, believing that the industry expertise of Mr. Meyers was essential for the panel to understand the business issues involved,

was unwilling to agree to such a modification, and Judge Smith acknowledged that Del Monte had the right to proceed with the full panel as contemplated by the License Agreement. (*Id.*)

Sunkist's statement that, following his appointment, the neutral arbitrator "urged the parties to discontinue communications with their appointed arbitrators" (Petition at 5) is misleading. This idea was proposed by Sunkist, and Del Monte was unwilling to waive its right to continue to communicate with its appointed arbitrator prior to the arbitration hearing. Judge Smith agreed that such communication "is obviously a matter of right" (R5-68-Exhibit 4 at 1), and Sunkist not only acknowledged that Del Monte was entitled to work with and prepare its arbitrator, but confirmed that Sunkist would do so as well:

> Sunkist will respect and abide by [Del Monte's] desire to continue communicating with Mr. Meyers, as appears to be their right under the AAA's rules and procedures. . . . *Given Del Monte's position, we will also work with and prepare our arbitrator.*

(R5-68-Exhibit 3 at 1) (emphasis added)

Notwithstanding this acknowledgement, Sunkist professed shock when it "discovered" shortly before the hearing that Del Monte had proceeded to work with and prepare Mr. Meyers. The only record support which Sunkist cites for its allegations about Mr. Meyers' conduct is its own motion and supporting brief before the district court, which was there supported only by unauthenticated attachments. (R4-67) Despite this doubtful record, Del Monte has confirmed throughout this litigation that

Mr. Meyers did in fact meet with counsel and other representatives of Del Monte in order to prepare for the arbitration hearing, pursuant to the AAA rules which all had agreed would apply. With one exception,[5] the individuals with whom Mr. Meyers met were either consultants who had been retained by Del Monte for purposes of the litigation (R4-67-12), or individuals who were officers and employees of Del Monte during the relevant time period and were responsible for the conduct of Del Monte which was at issue. (*Id.*)

As the Eleventh Circuit recognized, Sunkist offered no evidence to suggest that Mr. Meyers discussed any information he may have obtained in these meetings with the other arbitrators, or that any of the arbitrators, including Mr. Meyers, based their deliberations and award on anything other than the evidence introduced at the hearing. 10 F.3d at 759.

In the original License Agreement, Sunkist agreed that the arbitration would be governed by the rules of the AAA. (R4-63-8) Those rules provide that, with immaterial exceptions, all rules "shall be interpreted and applied by the AAA". (Rule 52, AAA Commercial Arbitration Rules) Doubtless for this very reason, Sunkist lodged with the AAA a request that it disqualify Mr. Meyers on the identical grounds which Sunkist now urges in its Petition, and a number of other grounds as well. (R4-63-Appendix T)

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[5] The sole exception was indeed a third-party witness, Mr. O'Reilly, but Mr. Meyers did not "discuss" his potential testimony with him in any way. Mr. Meyers was simply present while the witness was interviewed by Del Monte's counsel, and contributed nothing to the conversation. (R5-68-Exhibit 6 at 155)

The AAA concluded after "very careful consideration" that there was no basis to disqualify Mr. Meyers, and so advised the parties. (R4-63-Appendix V)

The Ruling Below

Sunkist's characterizations of the Eleventh Circuit's ruling in this case (Petition at 6-7) are incorrect in several material respects, which are discussed in detail *infra*.

SUMMARY OF THE ARGUMENT

The two questions proposed by Sunkist for review are not at issue in this case.

Neither the Eleventh Circuit opinion, nor the district court opinion which it affirmed, held that the "evident partiality" standard of 9 U.S.C. § 10(a)(2) does not apply to the conduct of Del Monte's arbitrator. To the contrary, both explicitly applied that standard and found that it had not been violated, given the reasonable expectations of the parties and the rules which the parties had agreed would govern the arbitration. This ruling is squarely in accord with the strong federal policy to enforce the terms of private arbitration agreements, and does not conflict in any way with decisions of this Court or of the circuit courts of appeal concerning the standards to be applied to arbitrator conduct.

In affirming the order compelling Sunkist to arbitrate, the Eleventh Circuit in no way suggested that a party to an agreement containing an arbitration clause could or should be compelled to arbitrate any claim

against a non-signatory which merely "presumes the existence" of the agreement. Rather, the court held that, because all of Sunkist's claims were clear attempts to hold Del Monte to obligations set out in the License Agreement, Sunkist should not be allowed to deny Del Monte the benefits of that same agreement, including the benefits of arbitration. In so doing, the Eleventh Circuit applied an analysis which has been approved and endorsed by every federal court which has addressed the issue.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS FOR WHICH SUNKIST SEEKS REVIEW ARE NOT RAISED ON THIS RECORD

Sunkist presents two questions for which it seeks review by this Court. (Petition at i) Neither question submitted by Sunkist is in controversy here.

A. The Courts Below Applied The "Evident Partiality" Standard Of 9 U.S.C. § 10(b) To Del Monte's Appointed Arbitrator

Sunkist states its first question proposed for review as follows:

> Does the "evident partiality" standard under Section 10(a)(2) of the Federal Arbitration Act (9 U.S.C. § 1, *et seq.*) apply to party-appointed arbitrators?

(Petition at i) Yet the Eleventh Circuit, in its opinion below, never even considered the possibility that the

"evident partiality" standard of § 10(a)(2) might not apply to a party-designated arbitrator. To the contrary, the Court stated that the issue was whether "the conduct of Jesse Meyers, the party-designated arbitrator chosen by Del Monte, was sufficiently inappropriate to constitute evident partiality and prejudicial misconduct in violation of § 10(a)(2) and (a)(3) of the Federal Arbitration Act, 9 U.S.C. § 1, et seq.," and concluded that it was not. 10 F.3d at 758. The district court decision which the Eleventh Circuit affirmed was also quite explicit that "the court is bound to apply the evident partiality standard equally to all arbitrators" (*see* Petition, Appendix C at A23), and concluded unambiguously that Mr. Meyers' pre-hearing communications "did not violate Section 10(a)(2), which prohibits evident partiality on behalf of arbitrators." (*Id.* at A25)

Because the courts below did not hold that the "evident partiality" standard is inapplicable to party-appointed arbitrators, the first question posed by Sunkist is not properly presented in this case.

B. The Eleventh Circuit Did Not Rule That Arbitration Should Be Compelled On Any Claim Which "Presumes The Existence" Of An Arbitration Agreement

The second question proposed by Sunkist for review is the following:

> Does Section 4 of the Federal Arbitration Act (9 U.S.C. § 4) compel arbitration on any claim which 'presumes the existence' of an agreement containing an arbitration clause?

(Petition at i) Again, the opinions below did not purport to announce any sort of rule or holding that every claim which "presumes the existence" of an agreement containing an arbitration clause must be arbitrated. While the Eleventh Circuit noted that each of Sunkist's claims "presumes the existence of" the License Agreement, 10 F.3d at 758, that was hardly the sole factor weighing in that court's decision to affirm the order compelling arbitration. Rather, the court made clear that the outcome turned on "the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the nonsignatory's obligations and duties in the contract." *Id.* at 757. It noted that courts have generally required plaintiffs to arbitrate with non-signatories when the plaintiffs "must rely on the terms of the written agreement in asserting their claims," *id.*, and concluded:

> The nexus between Sunkist's claims and the license agreement, as well as the integral relationship between SSD and Del Monte, leads us to the conclusion that the claims are 'intimately founded in and intertwined with' the license agreement. Therefore, we hold that Sunkist is equitably estopped from avoiding arbitration of its claims.

Id. at 758.

The district court opinion which the Eleventh Circuit affirmed made it equally clear that it did not order arbitration merely because Sunkist's claims "presumed the existence" of the License Agreement. The court expressly found:

> Evaluating Sunkist's causes of action under Delaware law, which all parties agree controls in

> this action, the Court is convinced that Sunkist is actually suing to enforce provisions of the licensing agreement.

(Petition, Appendix D at A34)

Because the courts below made no suggestion that arbitration should be compelled merely because a claim "presumes the existence" of an agreement containing an arbitration clause, Sunkist's second question proposed for review is not at issue in this case.

II. THE FINDING THAT SUNKIST HAD FAILED TO ESTABLISH "EVIDENT PARTIALITY" ON THE PART OF DEL MONTE'S APPOINTED ARBITRATOR DOES NOT MERIT REVIEW

This Court usually will consider issuing a writ of certiorari only when there are conflicting decisions on a question of federal law, or where the case presents an important issue of federal law which has not been settled by this Court. Sup. Ct. R. 10.1. Sunkist has labored to manufacture either a conflict or an undecided federal question in this case, but the truth is that the arbitrator conduct here was judged by the routine application of settled principles as to which the courts are in harmony.

A. The Ruling Below Does Not Conflict With Federal Decisions Regarding Whether The FAA's "Evident Partiality" Standard Applies To Party-Appointed Arbitrators

Sunkist first argues that 9 U.S.C. § 10(a)(2), which provides that a district court may vacate an arbitration award "where there was evident partiality or corruption

in the arbitrators, or either of them," has been "subjected to conflicting interpretations." (Petition at 12) Sunkist correctly reports a line of authority which holds that this language applies to all arbitrators, including those who are "party-appointed" (*id.* at 12 n. 17), but then purports to discover a "contrary line of authority," which "either ignores the 'evident partiality' standard completely, or holds that it does not apply" to party-appointed arbitrators. (*Id.* at 12) None of the decisions cited by Sunkist for this latter line of authority (*id.* at 12 n. 18) say any such thing.

Far from rejecting the "evident partiality" standard, the Seventh Circuit in *Merit Insurance Co. v. Leatherby Insurance Co.*, 714 F.2d 673 (7th Cir. 1983), explicitly applied it to the conduct of the party-appointed arbitrator there at issue, but found that partiality had not been established. 714 F.2d at 681. The other federal court of appeals case, *Lozano v. Maryland Casualty Co.*, 850 F.2d 1470, 1472 (11th Cir. 1988), *cert. denied*, 489 U.S. 1018, 109 S.Ct. 1136, 103 L.Ed.2d 197 (1989), did not even arise under the Federal Arbitration Act ("FAA") at all, but instead was governed by Florida arbitration law. 850 F.2d at 1471. Indeed, the language which Sunkist quotes from the opinion to the effect that a party-appointed arbitrator "need not be impartial" (Petition at 12 n. 18) was supported in the *Lozano* opinion by citation only to decisions of the Florida state courts. 850 F.2d at 1472. Even the district court opinions cited by Sunkist squarely apply § 10(a)(2) and its "evident partiality" standard to party-appointed arbitrators. *See Stef Shipping Corp. v. Norris Grain Co.*, 209 F. Supp. 249, 253 (S.D.N.Y. 1962) (recognizing application of § 10(a)(2), but holding that conduct at

issue did not establish "evident partiality"); *Metropolitan Property & Casualty Co. v. J. C. Penney Casualty Co.*, 780 F. Supp. 885, 891 (D.Conn. 1991), *aff'd without opinion*, 970 F.2d 899 (3d Cir. 1992) ("the court must determine whether Met's allegations provide a reasonable basis for finding evident partiality"). Thus, Sunkist has failed to point to any federal authority holding that the "evident partiality" standard of § 10(a)(2) does not apply to party-appointed arbitrators.

Sunkist attempts to confuse the issue further by invoking state arbitration statutes, and state court decisions interpreting them, which explicitly impose the "evident partiality" standard only on the neutral arbitrator, and not on party-appointed arbitrators. (Petition at 14-16) Such decisions of state law hardly create any cognizable "conflict" with decisions under the FAA. Moreover, Sunkist's suggestion that the Eleventh Circuit improperly relied on such state authority in reaching the decision below is simply wrong.

The Eleventh Circuit certainly cited both *Lozano* and *Stef*, but only for the proposition that it is common and expected under a tripartite arbitration that party-appointed arbitrators will not be strictly neutral, and will communicate freely with the parties nominating them. 10 F.3d at 759. The court found these typical characteristics of a party-appointed arbitrator to be pertinent, not because they are imposed by state arbitration statutes, but because they reflect the reasonable expectations of any party who voluntarily enters into a tripartite arbitration agreement, as Sunkist did here.

Sunkist's real complaint is not that the Eleventh Circuit and the district court failed to apply the "evident partiality" standard in this case; rather, Sunkist simply disagrees with how that standard was applied. The district court below explained the analysis succinctly:

> In deciding whether to vacate an arbitration award based on evident partiality, a court must determine whether a reasonable person would conclude that the arbitrator was partial. . . . The court is persuaded that in determining whether a reasonable person would find that Mr. Meyers' alleged conduct violated the standards expected of arbitrators, the court must take into consideration the particular arbitral process bargained for by the parties when they entered into their contract. While the court is bound to apply the evident partiality standard equally to all arbitrators, the court is not bound to ignore the realities and expectations engendered by the various potential types of arbitration panels.

(Petition, Appendix C at A22, A23) This approach is clearly correct, and presents no appropriate basis for review.

This Court has recognized that passage of the FAA "was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered," and has instructed that courts "must not overlook this principal objective when construing the statute." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985). *See also Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 476, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989) ("There is no federal

policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to insure the enforceability, according to their terms, of private agreements to arbitrate.")

In light of this overriding policy, it would have been clear error for the district court and the Eleventh Circuit *not* to take account of the agreement of the parties, including the expected roles of the arbitrators and the rules which it was agreed would apply to their conduct, in determining whether that conduct amounted to "evident partiality." Sunkist agreed to an arbitration clause which provided that the arbitration panel would be comprised of "two party-designated arbitrators" and "a third *neutral* arbitrator". (R2-25-Exhibit A at 44) (emphasis added). By specifying that only the third arbitrator was to be neutral, Sunkist plainly evidenced the intention that the party-appointed arbitrators would not be.

The agreement also specified that the arbitration would be "in accordance with the Rules of the American Arbitration Association." *Id.* Those rules expressly provide that "an arbitrator selected unilaterally by one party is a party-appointed arbitrator and is not subject to disqualification pursuant to Section 19 [disqualification for "bias," "financial or personal interest" or "relationship with the parties"]." AAA Commercial Arbitration Rules, Rule 12. *See also* AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes, Canon VII at 13 (Party-appointed arbitrators "may be predisposed toward the party who appointed them but in all othe. respects are obligated to act in good faith and with integrity and fairness.")

In light of Sunkist's agreement and the AAA rules under which it voluntarily agreed to proceed, the Eleventh Circuit concluded that "evident partiality" by a party-appointed arbitrator in the circumstances of this case would mean a failure to act "in good faith and with integrity and fairness." 10 F.3d at 759. Such an analysis is neither novel nor inconsistent with other federal court decisions applying 9 U.S.C. § 10. *See, e.g., Merit Insurance Co. v. Leatherby Insurance Co., supra,* 714 F.2d at 679 ("The parties to an arbitration choose their method of dispute resolution, and can ask no more impartiality than inheres in the method they have chosen."); *Goss Golden West Sheet Metal, Inc. v. Sheet Metal Workers International Union, Local 104,* 933 F.2d 759, 765 (9th Cir. 1991) (refusing to find partiality of party representatives on arbitration panel; such composition was contemplated by the agreement, and appellant "received exactly what it bargained for"); *Morelite Construction Corp. v. New York City District Council Carpenters Benefit Funds,* 748 F.2d 79, 84 (2d Cir. 1984) ("In assessing a given relationship [for evident partiality], courts must remain cognizant of peculiar commercial practices and factual variances.")

Sunkist is particularly ill-positioned to complain of the standard applied by the Eleventh Circuit in this case, for it is the very standard endorsed by Sunkist in its brief to that court:

> While Sunkist acknowledges that Mr. Meyers, like any party-appointed arbitrator, was permitted to be "predisposed" to Del Monte under AAA rules, it is undisputed that a party-arbitrator has a fundamental obligation to act in

> good faith, with integrity and fairness to all the parties.

(Brief of Appellant Sunkist Growers, Inc., dated March 26, 1992, at 39) The Eleventh Circuit expressly relied in its opinion on this concession by Sunkist, 10 F.3d at 759, and proceeded to apply the very "in good faith and with integrity and fairness" test which Sunkist had proposed. Even were this analysis not squarely supported by well-established policy and precedent under the FAA, Sunkist should hardly be heard to question before this Court the Eleventh Circuit's application of a rule of decision which Sunkist itself advocated.

B. The Decision Below Presents No "Conflicting Interpretation" Of This Court's Decision In Commonwealth Coatings

Sunkist next argues that the Court should use this case as a vehicle to revisit its decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968). Sunkist proposes that the Court resolve the question of whether an "appearance of bias" on the part of a *neutral* arbitrator is sufficient to vacate the award, and that it "provide clear guidance" as to whether Justice White's concurring opinion in *Commonwealth Coatings* supports the proposition that party-appointed arbitrators are not subject to the "evident partiality" standard. (Petition at 21)

As to the first issue, this is hardly an appropriate case in which to address the standard of conduct applicable to neutral arbitrators, since the conduct of the neutral arbitrator in this case was not challenged. Moreover, the

Eleventh Circuit recognized in *dictum* that the standard it applies to neutral arbitrators is that of "a reasonable appearance of bias," 10 F.3d at 758, a standard which has been so consistently invoked in opinions of the federal circuit courts as to represent a virtual consensus. *See, e.g., Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503, 1523 (3d Cir. 1994) ("[T]o show 'evident partiality,' 'the challenging party must show "a reasonable person would have to conclude that the arbitrator was partial" to the other party to the arbitration.' "), *quoting Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 (6th Cir. 1989), *cert. denied*, 495 U.S. 947, 110 S.Ct. 2206, 109 L.Ed.2d 533 (1990), *quoting in turn Morelite Construction Corp. v. New York City District Council Carpenters Benefit Fund*, 748 F.2d 79, 84 (2d Cir. 1984); *Toyota of Berkeley v. Automobile Salesmen's Union, Local 1095*, 834 F.2d 751, 755-56 (9th Cir. 1987), *cert. denied*, 486 U.S. 1043, 108 S.Ct. 2036, 100 L.Ed.2d 620 (1988) ("reasonable impression of partiality").

The second issue proposed by Sunkist has no more merit. The Eleventh Circuit did *not* rely on Justice White's concurrence in *Commonwealth Coatings* for the proposition that party-appointed arbitrators are "expected to be predisposed," as Sunkist asserts. (Petition at 21) The court cited that concurrence only for the proposition that arbitrators *in general* (neutral and party-appointed) "are not automatically disqualified by a business relationship with the parties before them." 10 F.3d at 760.

Despite its assertion that there is a "debate" on whether the "evident partiality" standard of 9 U.S.C. § 10(a)(2) applies to party-appointed arbitrators (Petition at 19), Sunkist fails to cite a single case, whether relying

on Justice White's concurrence in *Commonwealth Coatings* or not, which holds that the standard does not so apply.[6]

The Eleventh Circuit distinguished *Commonwealth Coatings* not only because it involved conduct by a neutral arbitrator, but also because the AAA rules were not controlling in that case, 10 F.3d at 760 n. 6, rules to which Sunkist voluntarily bound itself here. If *Commonwealth Coatings* is in need of clarification, then, and Sunkist has not demonstrated that it is, this case would be a singularly inappropriate vehicle for doing so.

C. Review Of This Case To Consider Whether 9 U.S.C. § 10(a)(2) Renders Conflicting Arbitration Agreements Unenforceable Would Be Wholly Inappropriate

Perhaps cognizant of the extent to which its agreement to abide by AAA rules undercuts its position in this case, Sunkist suggests that the Court should consider whether such an agreement should be "preempted" by § 10(a)(2), citing *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). The idea that *Volt* might provide authority for voiding agreements by parties as to the rules which will govern their arbitration is not only without support, but is flatly contrary to everything *Volt* stands for.

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[6] The only two cases cited by Sunkist, *Anderson v. Nichols*, 178 W.Va. 284, 359 S.E.2d 117 (1987), and *Aetna Casualty & Surety Co. v. Grabbert*, 590 A.2d 88 (R.I. 1991), were decided under state arbitration law, and discussed *Commonwealth Coatings* only as analogous authority. *See Anderson*, 359 S.E.2d at 119, 123-24; *Aetna*, 590 A.2d at 92-93.

In *Volt*, this Court held that an agreement of the parties that their arbitration would be governed by the California arbitration statute was *not* preempted by the FAA, even though the agreement was in interstate commerce and therefore fell under federal jurisdiction, and even though California law allowed stays of arbitration which would not have been permissible under the FAA. Noting that the "primary purpose" of the FAA is "insuring that private agreements to arbitrate are enforced according to their terms," this Court held that "parties are generally free to structure their arbitration agreements as they see fit." 489 U.S. at 479.

Sunkist's argument stands *Volt* on its head. Contrary to Sunkist's claim (Petition at 23), *Volt* in no way suggested that the FAA "imposed certain limits upon the parties' freedom to agree to varying procedures," or that such agreements would only be enforced if they did not "do violence to the policies behind" the Act. Rather, the Court recognized that enforcement of the agreement of the parties, even of an agreement "to arbitrate under different rules than those set forth in the Act itself," 489 U.S. at 479, *is* the overriding federal policy embodied in the Act:

> Where, as here, the parties have agreed to abide by state rules of arbitration, enforcing those rules according to the terms of the agreement is fully consistent with the goals of the FAA, even if the result is that arbitration is stayed where the Act would otherwise permit it to go forward. By permitting the courts to "rigorously enforce" such agreements according to their terms, . . . we give effect to the contractual

> rights and expectations of the parties, without doing violence to the policies behind the FAA.

489 U.S. at 479. There is no plausible reading under which this language can be stretched to support the idea that the FAA would render *any* otherwise valid arbitration agreement unenforceable, whatever its specific terms.

Preposterous as it is, Sunkist's argument is in any event not properly preserved for review. Before the Eleventh Circuit, Sunkist argued that the AAA rules and the AAA/ABA Code of Ethics properly applied to and governed Mr. Meyers' conduct:

> The Code of Ethics was jointly prepared by the American Bar Association and the AAA as a standard of ethical behavior for *all* arbitrators, including party-designated arbitrators. . . . The arbitration agreement at issue herein provides that the arbitration shall be conducted "in accordance with the Rules of the American Arbitration Association. . . . " (R4-63-8; *see* App. C) Del Monte having invoked the arbitration clause and the applicable FAA standards, is bound, therefore, by the standards and procedures set forth in these rules.

(Brief of Appellant Sunkist Growers, Inc., dated March 26, 1992, at 38 n. 18; *see also id.* at 39) At no time in the proceedings below did Sunkist urge that those rules were or should be void or unenforceable under federal law. Sunkist should not be allowed to reverse its position and raise the issue for the first time before this Court. *See, e.g., Miree v. DeKalb County*, 433 U.S. 25, 33-34, 97 S.Ct. 2490, 53 L.Ed.2d 557 (1977) ("The fact that this asserted basis of liability is so obviously an afterthought may be some indication of its merit, but since it was neither pleaded,

argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it.").

III. THE AFFIRMANCE OF THE DISTRICT COURT'S ORDER COMPELLING SUNKIST TO ARBITRATE ITS CLAIMS PROVIDES NO APPROPRIATE BASIS FOR REVIEW BY THIS COURT

A. The Ruling Below Is Not In Conflict With Any Other Federal Decision

Sunkist argues that in affirming the district court's order compelling Sunkist to arbitrate its claims, the Eleventh Circuit is "in conflict with traditional applications" of estoppel doctrine (Petition at 27-28), citing non-arbitration cases which arose in entirely different contexts.[7] None of those decisions suggest that the elements of the various forms of estoppel there considered necessarily apply in all other factual and procedural contexts, or should operate to preclude the flexibility to do justice in the particular case. To the contrary, in *Travelers Indemnity Co. v. Swanson*, 662 F.2d 1098 (5th Cir. 1981), the primary case upon which Sunkist relies, the Fifth Circuit noted that "because estoppel is equitable in nature, it 'depends upon the facts and circumstances of each case,' " and recognized

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[7] *Travelers Indemnity Co. v. Swanson*, 662 F.2d 1098 (5th Cir. 1981), held that an insurer of a rental car company was estopped from seeking indemnification from a rental customer on a judgment which had been entered and satisfied without notice to the customer. The four judicial estoppel cases cited by Sunkist (Petition at 28 nn. 59 & 60) each concerned whether a party was bound in a later case by a factual assertion made or position taken in prior litigation.

the "well-settled" rule that, apart from the traditional estoppel elements, a party should generally be estopped "from asserting legal rights to the detriment of another party when to do so would be unconscionable." 662 F.2d at 1101 (citations to Florida cases omitted).

In compelling Sunkist to arbitrate its claims, the Eleventh Circuit and the district court simply applied the long established equitable precept that a party may not accept the benefits of a contract and at the same time reject its obligations. *See, e.g., Brant v. Virginia Coal & Iron Co.*, 93 U.S. 326, 336, 23 L.Ed. 927 (1876) ("[W]here one has received the fruits of a transaction, he is not permitted to deny its validity whilst retaining its benefits."). Delaware, whose law governs issues of contract in this action (*see* Petition, Appendix D at A34), has repeatedly recognized this principle as a matter of contract law. *See, e.g., Eastern States Petroleum Co., Inc. v. Universal Oil Products Co.*, 49 A.2d 612, 616 (Del.Ch. 1946) (a party "cannot accept the benefits received under a contract on the one hand and shirk its disadvantages on the other"); *Graham v. State Farm Mutual Automobile Ins. Co.*, 565 A.2d 908, 913 (Del. 1989) (same).

It is this fundamental principle of justice and equity which forms the basis for the long line of federal cases which apply estoppel to prevent a party from trying to impose the obligations of a contract on a non-signatory while simultaneously denying that non-signatory the benefits of the contract's arbitration clause. *See Hughes Masonry Co., Inc. v. Greater Clark County School Building Corp.*, 659 F.2d 836, 839 (7th Cir. 1981) ("To allow [defendant] to claim the benefit of the contract and simultaneously avoid its burdens would both disregard equity

and contravene the purposes underlying enactment of the Arbitration Act."), *quoting Avila Group, Inc. v. Norma J. of California*, 426 F. Supp. 537, 540 (S.D.N.Y. 1977); *Tepper Realty Co. v. Mosaic Tile Co.*, 259 F. Supp. 688, 692 (S.D.N.Y. 1966) (plaintiffs "cannot rely on the contract, when it works to their advantage, and repudiate it when it works to their disadvantage").

The fact is that, far from creating a conflict with other federal decisions, the equitable estoppel analysis invoked by the Eleventh Circuit here has been approved by every other federal court to address the issue in the arbitration context. *See J. J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 320-21 (4th Cir. 1988); *McBro Planning & Development Co. v. Triangle Electrical Construction Co., Inc.*, 741 F.2d 342, 344 (11th Cir. 1984); *Hughes Masonry Co., Inc., supra*; *Mutual Benefit Life Insurance Co. v. Zimmerman*, 783 F. Supp. 853 (D.C.N.J. 1992) (recognizing doctrine but finding it inapplicable to particular claims asserted); *Dunn Construction Co., Inc. v. Sugar Beach Condominium Association, Inc.*, 697 F. Supp. 488 (S.D.Ala. 1991); *A. L. Williams & Associates, Inc. v. McMahon*, 697 F. Supp. 488 (N.D.Ga. 1988); *Avila Group, Inc., supra*; *Tepper Realty Co., supra.*

B. The Eleventh Circuit Was Clearly Correct In Holding Sunkist To Its Arbitration Agreement

Sunkist argues that there was no inconsistency in its pursuit of claims against Del Monte while denying that Del Monte was entitled to arbitrate under the License Agreement. (Petition at 29) Sunkist can only give the argument even facial plausibility by blatantly mischaracterizing the nature of the claims which it asserted. Contrary to Sunkist's representations to this Court (Petition at 29), in its original complaint Sunkist specifically alleged that Del Monte "jointly participated" with SSD in breaching the License Agreement and its implied covenant of good faith and fair dealing, and asserted that Del Monte was "jointly and severally responsible" for such breaches. (California Complaint at 26-28) All of the claims asserted by Sunkist, including its tortious interference with contract claim, were explicitly predicated on the allegation that Del Monte, either directly or through its control of SSD, engaged in various kinds of conduct which were wrongful only as measured against duties and obligations set out in the License Agreement. (*See generally id.* at 8-33)

After reviewing Sunkist's allegations, the district court was "convinced that Sunkist is actually suing to enforce provisions of the licensing agreement" (*see* Petition, Appendix D at A34), describing Sunkist's recharacterization of those claims, in which it persists before this Court, as "nothing more than post hoc rationalization to avoid arbitration." (*Id.* at A35) In affirming, the Eleventh Circuit agreed that each of the claims asserted by Sunkist

"arises out of and relates directly to the license agreement." 10 F.3d at 758.

The affirmance of the order compelling Sunkist to arbitrate its claims was plainly correct, and does not warrant review by this Court.

CONCLUSION

The questions proposed by Sunkist for review are not presented on this record, for the Eleventh Circuit neither refused to apply the "evident partiality" standard to Del Monte's arbitrator, nor held that arbitration may be compelled on every claim which "presumes the existence" of an arbitration agreement. More broadly, Sunkist has failed to articulate any respect in which the Eleventh Circuit's opinion below is in conflict with decisions of this Court or other federal courts, or presents an important and unsettled issue of federal law.

Sunkist makes much of the need to foster public confidence in the arbitration process. Nothing could be more destructive to the public's willingness to enter into arbitration agreements than the belief that they will not be enforced by the courts according to their terms. After eight years of litigation, it is high time that Sunkist's efforts to avoid its arbitration obligations be put to final rest. Sunkist's petition should be denied.

This the 4th day of August, 1994.

Respectfully submitted,

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